

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Remedial Steps For Failure to Comply With)	
Digital Television Construction Schedule)	MM Docket No. 02-113
)	
To: The Commission		

Comments

Brunson Communications, Inc. ("Brunson"), by counsel, hereby submits these Comments in the above-captioned proceeding.¹ Brunson is the licensee of television broadcast station WGTW, Burlington, New Jersey and holds a permit for construction of DTV facilities.² As explained below, the proposed procedure for the disposition of DTV permits where the Media Bureau has denied an extension request is problematic in a number of respects.

First, it is not wholly clear from the *NPRM* that the current standard for obtaining an extension in the first instance will remain in effect beyond the extension's initial six month period. The FCC should clarify that the existing standard of Section 73.624(d)(3) -- whose critical predicate is "circumstances that are either unforeseeable or beyond the licensee's control" -- will not be changed.

Second, the proposed "extraordinary and compelling circumstances" test is analytically unserviceable and should not be adopted.

Third, the *NPRM*'s proposal to delegate authority to the Media Bureau to *deny* extension requests will, as a practical matter, create a *de facto* presumption working against an appeal of an

¹ Order and Notice of Proposed Rulemaking, MM Docket No. 02-113, rel. May 24, 2002 ("*NPRM*").

² The relatively new NTSC facilities of WGTW operate on Channel 48. WGTW is the only full service television station in the nation owned by an African American woman..

adverse decision by the Bureau. Given the unique public interest considerations at stake in the DTV context, delegating such authority to the Bureau is ill advised.

Fourth, an administrative hearing would be required before the FCC could strip a station of its DTV authorization.

Fifth, the decision whether to open a revoked DTV authorization to auction or to delete the allotment from the DTV Table of Allotments should not be made until final revocation in light of the public interest as it relates to the particular market to be served.

Sixth, under no circumstances should licensees be subject to competing applications for their original (analog) channels when the time comes for conversion of the NTSC operation to the digital mode.

1. The FCC Should Clarify That the Current Standard of Section 73.624(d)(3) Will Continue to Apply to Extension Requests.

Pursuant to Section 73.624(d)(3) of the Commission's Rules, the Media Bureau may now extend the DTV Deadline for up to two periods of six months each for any licensee who satisfies specified criteria, after which additional extension requests made be submitted to the Commission. Broadcasters seeking an extension must demonstrate that “circumstances that are either unforeseeable or beyond the licensee's control” prevented timely construction and that “the licensee has taken all reasonable steps to resolve the problem expeditiously.”³ “Such circumstances include, but are not limited to, the inability to construct and place in operation a facility necessary for transmitting DTV, such as a tower, because of delays in obtaining zoning or

³ 47 C.F.R. §73.624(d)(3)(I). *See also, Remedial Steps For Failure to Comply With Digital Television Construction Schedule*, FCC 02-150, ¶16 (May 24, 2002)(“NPRM”), citing *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12841 (1997) and *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd at 20594, 20611 (2001).

FAA approvals, or similar constraints on the lack of equipment to transmit a DTV signal.”⁴ The current rule also permits certain stations to receive an extension of the deadline by establishing that the delay was occasioned by “legitimate financial hardship.” *Id.*

The Commission should clarify that the *NPRM* does not propose any change in the standard for grant of an application for extension of the digital construction deadline. *NPRM* at ¶¶17-19. The logical structure of the *NPRM* requires that this be the case. However, the reference in ¶17 to applications that “fail to adequately demonstrate that extension of [the] DTV construction deadline is justified,” does not specify that such justification is a function of the current standard of Section 73.624(d)(3). In the sentences following that clause, the Commission introduces the notion of “extraordinary and compelling circumstances.” To avoid any confusion on this score, the FCC should clarify that the underlying standard for initial assessment of an extension is unchanged. Otherwise, the proposal could be read as one to bar any extension except where the broadcaster had demonstrated a cause for delay that is *both* “extraordinary and compelling,” rather than merely shown that the delay was *either* unforeseeable *or* unavoidable. *Id.*

2. The “Extraordinary and Compelling Circumstances” Test is Not Analytically Serviceable.

At ¶¶17-19, the FCC sets forth its proposed procedure for disposition of a licensee's DTV authorization in the event that its extension application is denied. We will refer to this as the “Post-denial Period.” The Commission proposed that, subject to certain reporting requirements, the licensee would have six months in which to complete construction, “absent extraordinary and compelling circumstances.” In the event that six month deadline passes, then -- again “absent extraordinary and compelling circumstances” -- a Notice of Apparent Liability for

⁴ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 11 CR 605 (1998), ¶56.

Forfeiture will issue. *Ibid.* The strong implication is that the “extraordinary and compelling circumstances” test is somehow different from, and more stringent than, the existing standard of Section 73.624(d)(3).

The *NPRM*'s proposed formulation of assessing a licensee's status during the Post-denial Period is seriously flawed. To see this, suppose that during the (potentially) 12-month duration of the Post-denial Period, conditions materialize that quite plainly constitute “circumstances that are either unforeseeable or beyond the licensee's control.” Section 73.624(d)(3). For example, suppose that construction of a needed new tower is delayed by a lack of zoning approval. Zoning boards are not subject to the jurisdiction of the Commission (except that certain issues such as electromagnetic interference have been preempted by the Commission). Zoning battles are not “extraordinary”; many broadcasters have to fight them every time they have to erect a tower. Is the broadcaster to be condemned to a loss of its DTV authorization and fines by the FCC merely because neither the broadcaster nor the FCC can make local zoning authorities bend to the FCC's will or that of the broadcaster?

In Brunson's case, its DTV plans have been delayed by the congestion in the Northeast Corridor recognized by the Commission (which has severely limited Brunson's tower options), and by the need to secure permission for DTV expansion from the owner of the ground beneath Brunson's existing tower. The landowner's ultimate recalcitrance is a matter beyond Brunson's control, but will it be deemed “extraordinary”?

Refusing additional time except in extraordinary and compelling circumstances would change the sound approach of the existing Rules to a draconian system. Whereas the current Rule allows broadcasters to seek further extensions from the full Commission by demonstrating continued unavoidable roadblocks, the new approach would permit revocation of a digital license if a broadcaster cannot demonstrate “extraordinary and compelling circumstances.” Moreover,

by directing the Media Bureau “to utiliz[e] the full range of permissible sanctions, including those set forth in this [*NPRM*],” the FCC has essentially adopted the new approach already. *Id.* at ¶21.

The Commission's proposed change in the standard for obtaining an extension, as well as the contemplated penalties for failing to construct digital facilities as quickly as the FCC would prefer, would only serve to increase the heavy burden on broadcasters who are struggling to construct digital facilities. As explained below, broadcasters face the high cost of constructing a digital facility, as well as the reluctance of consumers to embrace the high cost of purchasing digital receivers. The harm caused to broadcasters by making extensions more difficult to obtain and by imposing harsh penalties for failing to obtain those extensions greatly outweighs any possible benefit to the public interest. The *NPRM* seems to partake of the attitude that broadcasters are indolent “fat cats” who would have all converted to DTV if they were as diligent as the FCC. In reality, many broadcasters confront a herculean task of constructing expensive digital facilities amid a poor economic climate and numerous other obstacles. For example, some major parts of Brunson’s NTSC operation are only a few years old. Brunson has not yet come close to paying off the mountain of debt incurred in order to construct that facility and for other acquisition requirements. The financial demands of DTV conversion are far from trivial. Because Brunson has no way to gain new viewers or revenue by broadcasting in the digital mode, Brunson must exercise prudence in working toward construction of its digital facility, a task that may not be achievable within the coming year.

Nonetheless, the FCC proposes to tighten the standard for a grant of additional time in such a way that Brunson arguably may not qualify. While Brunson can easily demonstrate that the delay in constructing its digital facility has been unavoidable, it arguably faces the same high costs and lack of access to funding that many broadcasters face in the wake of the September 11

attacks and a slow recovery from economic recession. Other broadcasters also face extremely limited tower space options.

Accordingly, Brunson's situation is unusual in several respects, certainly compelling, but will the Commission agree that it is "extraordinary"? The *NPRM* does not provide enough clarification for a licensee to understand exactly what standard is being proposed.

Likewise, many broadcasters can undoubtedly cite unavoidable circumstances that will prevent them from constructing digital facilities in accordance with the Commission's preferred schedule. However, the *NPRM* is devoid of guidance as to whether such problems are both "extraordinary and compelling."

The Commission should not adopt measures that put licensees at risk of financial failure, jeopardizing their NTSC operations as well as the nascent digital service. Rather, the FCC should adopt policies that have the effect of increasing competition. To the extent that the proposed approach will result in stations forfeiting their digital authorization, it will be counterproductive. That outcome will only increase uncertainty among consumers and decrease demand for digital service in the immediate future.

3. Delegating Authority to the Media Bureau to Deny Extension Requests is Ill-Advised.

The *NPRM* also announces the amendment of Section 73.624(d)(3)(iii) such that it will now provide that the Media Bureau will have authority to deny requests for extension of DTV construction deadlines, a change the FCC has effected "without notice and comment" because it is a "procedural rule." *NPRM* at n. 18.

Brunson urges the FCC to reconsider this action. In some other contexts, of course, the Bureau's use of delegated authority to deny an application would not be controversial. However, in this context the change represents a rejection of the wise approach adopted initially, whereby

the full Commission would review a recommended denial. By that safeguard, licensees would have been protected from arbitrary and precipitous denials such as that visited on Brunson. As a practical matter, once the Bureau has purported to deny a DTV extension application, a presumption against grant will already be in place when the matter reaches the Commission on appeal. Indeed, the Commission took this risk seriously enough that it heretofore reserved denial authority to itself in this special context, no doubt in light of the huge stakes involved.

Because of those stakes, it seems likely that most licensees whose extension requests were denied would pursue their rights to seek reconsideration. Thus, the Bureau would then be reconsidering its action while at the same time either the Bureau or the Commission would be reviewing the permit under the Post-denial Period scheme. In the meantime, the six-month clock would be inexorably ticking.

In that regard, the *NPRM* is unclear as to whether the various review procedures it describes for the Post-denial Period would be undertaken by the Bureau or (as is implied by the use of the first person) by the full Commission. If the latter, this dual-track scenario risks introducing senseless complexity and confusion into the review process.

4. Elimination of a DTV Authorization Cannot Occur Without a Hearing.

There is no question but that a proceeding aimed at elimination of a broadcaster's DTV authorization would require an administrative hearing before such action could become effective. The DTV permit is not of the nature of an initial construction permit for a new NTSC facility, which has not yet ripened into a license. In the case of the DTV permit, the broadcaster had to have a license (or at least an initial construction permit that by now has ripened into a license) in order to qualify for a DTV permit. The DTV authorization is the equivalent of a license, as it represents an eventual substitute for the NTSC channel currently licensed to the broadcaster rather than a vehicle for reaching more viewers than the station enjoyed before the transition

started. Pursuant to Section 312(c), an order to show cause and a hearing are required before a forfeiture of this gravity can be effectuated. *In re Applications of Interactive Control Two, Inc.*, 24 CR 1249 (2001) at n. 103 (“Section 312 lists . . . discrete grounds for revoking a license and requires that a hearing precede revocation”).

5. Whether To Open a Revoked DTV Authorization to Auction Or to Delete the Allotment Should Not Be Decided Until Final Revocation In Light of the Public Interest As It Relates to the Particular Market to Be Served.

The *NPRM* seeks comments on whether to auction a revoked DTV frequency to other would-be DTV broadcasters, or eliminate that frequency from the DTV allotment table. This question cannot be answered without resort to Section 307(b) of the Communications Act of 1934, as amended. In some situations, the FCC may eventually determine that the goals of Section 307(b) are best served by eliminating a given DTV allotment. In other cases, the public interest will be maximized by leaving the allotment in place. At present, it is too early to say whether stations in nearby towns will need that spectrum to a degree that warrants removal of that frequency from its current community of license.

The Commission cannot make that determination now, before it knows the specifics of the channels that will need to be considered in this context. Moreover, circumstances may change in the interim. Therefore, such deliberations are best left to the time when a decision can be made by focusing on the relevant factors that bear on a particular frequency, city and state.

6. Under No Circumstances Should Licensees be Subject to Competing Applications For Their Original (Analog) Channels When the Time Comes for Conversion of the NTSC Operation to the Digital Mode.

Over a decade ago, Congress did away with the procedure under which television licensees had been subjected, at renewal time, to competing applications for their frequencies. Endless hearings, extortion attempts and other ills had plagued that system. The instant *NPRM*

proposes a new version of the tried but untrue comparative renewal procedure by suggesting that a broadcaster who could not convert to digital on the desired schedule would, in effect, face confiscation of his or her entire investment in the existing NTSC channel. A broadcaster who is financially unable to build a DTV facility in quick time is not likely to have the funds to defeat all competing bidders at an auction for the very frequency that the broadcaster has developed.

Some licensees, including Brunson, have spent tens of millions of dollars acquiring their current facilities. Indeed, the financial burdens associated with the NTSC operation, in many instances, are the cause for the broadcaster's inability to construct a DTV plant within the desired time. It is somewhat stunning for the government to propose, in virtually a cavalier fashion, the forfeiture of a seven or eight figure investment merely because the licensee grappled with obstacles in building a DTV facility that were not deemed sufficiently extraordinary or compelling.

Conclusion

In view of the foregoing, the Commission should neither increase the burden of obtaining an extension of the deadline for constructing a digital facility nor impose harsh penalties for failing to construct as quickly as the FCC would prefer. The burden of such changes would prove fundamentally unfair to broadcasters, such as Brunson, without a realistic opportunity to construct a digital facility anytime soon. The harm that the Commission's proposed approach would cause to such broadcasters vastly outweighs any benefit from bullying them into attempting to offer digital service prematurely. Accordingly, the Commission should adopt an approach that continues to grant further extensions for broadcasters facing unavoidable delays.

Respectfully submitted,

Brunson Communications, Inc.

By: _____
Barry D. Wood
Stuart W. Nolan, Jr.

WOOD, MAINES & BROWN,
CHARTERED
1827 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 293-5333

Its counsel

Dated: July 8, 2002